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Chairman: Mr. LAMPTEY (Ghana)

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AGENDA ITEM 137: REPORT OF THE INTERNATIONAL LAW COMMISSION ON THE WORK OF ITS FORTY-SIXTH SESSION

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The meeting was called to order at 3.50 p.m.

AGENDA ITEM 137: REPORT OF THE INTERNATIONAL LAW COMMISSION ON THE WORK OF ITS FORTY-SIXTH SESSION (continued) (A/49/10 and A/49/355)

1. Mr. PAMBOU-TCHIVOUNDA (Gabon) said he was pleased that the report of the International Law Commission on the work of its forty-sixth session had focused on the Commission's two spheres of competence, namely, the codification and progressive development of international law. It was none the less regrettable that the Working Group had made only slight and merely formal improvements to the first draft statute for an international criminal court, and that the substantive matters which had prompted less than enthusiastic reactions from the Gabonese delegation had not been resolved. He therefore felt it necessary to reiterate his reservations, starting with general observations and moving on to more specific matters.

2. Noting that a poorly conceived instrument could produce nothing but poor results, he drew attention to three major weaknesses in the draft statute, which clumsily combined substantive and procedural matters, without any attempt to place them in some kind of order. Moreover, a lack of clarity affected the complementary relationship which the draft statute was supposed to establish between the national criminal justice system and the proposed international criminal justice system. There was no indication as to whether that would be a hierarchical type of relationship, or whether the international criminal court would be given an advisory role vis-à-vis national courts or even be competent to vary the decisions of the latter in application of international law. In his delegation's view, the Commission should be wary of exposing the court to the vicissitudes of an outmoded State constitutionalism, which might alter the court's jurisdiction ratione loci and ratione materiae. Lastly, he was baffled by the deliberately created confusion in the draft articles as to the bodies entitled to bring a matter before the court; for although he understood the Commission's desire that reliance on a certain concept of international public order should remain the prerogative of the United Nations Security Council, he wondered why that privilege should not also be granted to any State or group of States, or even the Commission of the European Union, the Council of the League of Arab States or the Conference of the Organization of African Unity.

3. With regard to the jurisdiction of the Court, the list given in article 20 seemed rather inconsistent. Referring to the crimes defined under existing legal instruments, the authors had included the crime of genocide; however, they had left out that of apartheid, just when events in the former Yugoslavia and the treatment of the Kurdish people by the Iraqis and Iranians gave reason to fear that there were those who were still drawn to the South African model. The problem was that it was difficult to assign a substantive purpose to rules which were presumably procedural in nature without confusing the categories involved. The procedural rules could not be usefully applied until the basic rules had been defined under a legal instrument, which could be none other than the draft Code of Crimes against the Peace and Security of Mankind. For that reason his

delegation urged the Commission to devote the whole of its forthcoming session to the drafting of that Code.

4. As to the role of the Security Council, Gabon felt that it was in the interests of the Security Council to have no interaction whatsoever with the court, since there was no guarantee that the cases it might bring before the court would be declared admissible. A series of challenges to admissibility by the court would weaken the Security Council's authority in the matter in question and might well place it in open conflict with the court, a situation which would do little to enhance its reputation. On the contrary, the objective character, in respect of erga omnes applicability, recognized in the statute would ensure the court's true independence, since only States could bring cases before it, which was fully in keeping with the traditional political role of the Security Council.

5. With regard to applicable law, his delegation was surprised at the absence of any reference in article 33 to other sources of substantive international law. The reference to "applicable treaties" was admittedly convenient, but it brought to mind the draft Code of Crimes against the Peace and Security of Mankind, without explicitly referring to it. In point of fact, the code did not yet exist because the Commission was going to great lengths to ensure that it never came into existence. The General Assembly must therefore assume its responsibilities and draw its conclusions from the current situation on the Commission's future work programme. For the time being, his delegation recommended that article 33 should be redrafted to broaden the range of applicable rules, so that over and above the statute, the court could apply the draft Code of Crimes against the Peace and Security of Mankind, treaties relating to certain specific crimes, principles and rules of international law, the relevant acts of international organizations and, if necessary, any rule of national law.

6. Gabon felt that chapter III of the report, entitled "The law of the non-navigational uses of international watercourses", had come just at the right time to enhance the prestige of the Commission, which had been not only realistic in opting for the framework convention but also methodical in avoiding extending the scope of the article to cover confined transboundary groundwaters. His delegation was pleased that the Commission had resisted the temptation to make the regimes applicable to two different types of watercourses. The development of a system applicable to groundwaters would also highlight their particular characteristics, and therefore the particular law applicable to them.

7. His delegation had therefore no hesitation in associating itself with those who had endorsed the draft articles. There were two points, however - one essential the other of minor importance - on which it had some reservations. The former concerned the introductory part on the scope of the articles and use of terms. The current version of the draft convention contained very few definitions, which were none the less important in interpreting treaties. One would have therefore expected greater priority to be given in the draft convention to a definition of its purpose, in particular a definition of the term "uses". Consequently, his delegation proposed that the following

definition should be inserted in draft article 1: "All activities of an industrial, economic or private nature which require special technical works and means in connection with the jurisdiction or control of the watercourse State".

8. The second point referred to draft article 33 concerning the settlement of disputes. His delegation considered that the technical nature of the subject did not justify the great detail in the wording of subparagraph (b). It would be better to keep to the essential point, which was to establish the principle of international fact-finding. He therefore suggested that the detailed provisions of subparagraphs (i) et seq. should be deleted.

9. Lastly, he said that the International Law Commission's treatment of the statute for an international criminal court did not go as far as his delegation had expected. He therefore suggested that the General Assembly should set up ad hoc intergovernmental machinery to re-examine the draft article. His delegation would wish to participate.

10. Mr. GARCIA (Colombia) said that the draft articles on the law of the non-navigational uses of international watercourses made a significant contribution to the progressive development of international law. Nevertheless, it would be useful to give a more precise definition of their scope. Article 3, which allowed States to consult with a view to negotiating watercourse agreements, was quite satisfactory. Referring to articles 5, 6 and 7, he said that differences of opinion on details persisted, although the Commission had made an effort to lay down norms which would enable many States to accede. Similarly, the continuing differences of opinion on articles 8 and 9, 20 to 23 and 27 and 28 did not seem very great and should thus be very easily resolved.

11. With regard to the settlement of disputes, his delegation considered that the arrangement proposed by the Commission was balanced and offered a very wide range of possibilities.

12. Lastly, he strongly recommended that, owing to the highly specialized nature of the subject, the task of drawing up a convention on the law of the non-navigational uses of international watercourses should be entrusted to a plenipotentiary conference.

13. Mr. GONZALES FELIX (Mexico) said that the draft articles on the law of the non-navigational uses of international watercourses were entirely satisfactory. He welcomed particularly the fact that principle 21 of the Stockholm Declaration and principle 2 of the Rio Declaration, obliging States to refrain from carrying out activities on their territory which might jeopardize a neighbouring State's territory, had been duly incorporated into the draft. Further, the International Law Commission had not simply restated that fundamental principle of international coexistence, but had also established specific mechanisms for translating that obligation into action. Obligations such as due diligence, equitable and reasonable use and the obligation not to cause significant harm were supplemented by the provisions of articles 8, 9, 11, 12, 14 and 17, on the general obligation to cooperate, the regular exchange of data and information, on the obligation to provide timely notification and to hold consultations and

negotiations concerning planned measures. His delegation could only give its fullest support to those provisions, which added weight to the basic obligation to avoid transboundary harm.

14. He welcomed the recognition in the draft of States' right to conclude agreements which would require adjustment or application of the provisions of the projected convention because of the characteristics of any given watercourse, and that, throughout the draft, the adjective "appreciable" had been replaced by "significant".

15. Lastly, the importance of confined transboundary groundwater and the almost total lack of guidelines on their use highlighted the need to establish a framework recognizing the special characteristics of those bodies of water and contributed to their conservation. The subject would require further study and his delegation supported the International Law Commission's decision not to extend the scope of the draft to include confined transboundary groundwater. Nevertheless, it would be necessary in the near future to draw up an international instrument regulating the use of such bodies of water.

16. The delegation of Mexico agreed with other delegations that it was time to adopt the draft and would support any move in that direction.

17. Mrs. BELLIARD (France) said that her delegation did not wish to see the scope of the draft articles on the law of the non-navigational uses of international watercourses extended to include confined transboundary groundwater. The International Law Commission had made a wise decision by placing its recommendations on that subject in a separate resolution, apart from the articles. It would have been possible to include such bodies of water in the framework of the draft only if specific provisions had been incorporated, which would inevitably have further complicated the whole task.

18. In amending the draft, the International Law Commission had rightly been loath to delete from the definition of "watercourse" the requirement for a common terminus. Deletion of that requirement would have added considerably to the ambiguity of the definition. Her delegation regretted, however, that the International Law Commission, in its concern to reach a compromise, had seen fit to state that such a requirement was merely "normal" (so that the new definition read, "normally flowing into a common terminus"). However understandable the underlying considerations which had led the International Law Commission to that wording (for example, the need to cover deltas), there was no guarantee that the adverb "normally" would be explicit enough to avoid confusion.

19. Her delegation considered article 33 on the settlement of disputes to be too restricting. The International Law Commission should have taken a more practical position by allowing the parties to decide what form of settlement would be most appropriate. Her delegation, therefore, did not agree with the numerous detailed provisions the International Law Commission had inserted into the settlement procedures. It particularly objected to the provisions on the composition of the Fact-Finding Commission and the appointment of its Chairman - with reference to the United Nations Secretary-General if necessary - all of

which were too detailed to win the support of many States. Further, such detailed provisions might not be necessary if the preferred form of the articles was that of model rules rather than that of a framework convention. The articles could be considered conventional in nature only if they could be used to draw up a framework convention which would have residual force in relation to specific conventions and would focus on basic principles.

20. Her delegation wished to avoid all conflict between the norms laid down by the draft and those embodied in existing or future watercourse agreements. Specific watercourse agreements which could be concluded in the future should override the general convention. Yet States' ability to conclude an agreement on a given watercourse seemed peculiarly restricted by the provisions of article 3 indicating that, in any case, watercourse agreements would "apply and adjust" the provisions of the framework convention. If, in the context of draft articles laying down principles which at times went beyond international customary law and which went into great detail, "adjustment" could be understood in a very broad sense, then her delegation would find that wording ambiguous and would have preferred to make provision for "waiver of the provisions of the present articles". Further, there was cause for concern in the absence of any mention in the draft of watercourse agreements which had already come into force. She reiterated that it was necessary to stipulate that a prior agreement would retain validity unless the parties agreed to give precedence to the International Law Commission's formulation. In the absence of such provision, the only other possibility would be for each State, on ratifying the treaty, to make a statement of interpretation or a reservation indicating whether they wished to continue to be bound by the previous specific watercourse agreements. That would be very difficult in practice since all States parties to the watercourse agreement would be obliged to make such a statement of interpretation or such a reservation. It would thus not be clear that certain provisions of the draft articles should be residual in nature if it was decided to transform them into a framework convention.

21. A framework convention should remain sufficiently general to apply to the range of different situations throughout the world. Article 5 required States to utilize a watercourse equitably and reasonably. Such a provision in a treaty having the scope of a framework convention would have the effect of giving the obligation of equitable and reasonable utilization the status of a legal norm. That was a considerable step forward but it was not certain that a significant number of States took the same view of that principle. It would have been preferable to adopt a more cautious formulation, such as "the parties shall take all appropriate measures ... to ensure that transboundary waters are used in a reasonable and equitable way", a wording that appeared in the Convention on the Protection and Use of Transboundary Watercourses and International Lakes, signed in 1992.

22. Draft article 24 required that, at the request of any of them, the watercourse States should enter into consultations concerning the management of an international watercourse, which might include the establishment of a joint management mechanism. That wording was an improvement on what had been proposed in earlier years, but it deliberately went beyond the framework instrument, as

seemed to be the intention of the Commission, and beyond international law in force. In existing customary law there was an obligation to consult on a case-by-case basis only when a project relating to a watercourse might seriously compromise the interests of another State.

23. She indicated that none of her observations or queries, taken in isolation, should be regarded as impeding the acceptance of the Commission's suggestion to transform the draft articles into a convention. Conversely, it was the combination of the difficulties which gave rise to the questions raised by the French delegation, in other words, on the one hand, a draft that was very detailed and very forward-looking in terms of international law, which gave it a certain inflexibility that was likely to raise objections on the part of many States, and, on the other hand, a draft which seemed, in many circumstances, to take precedence over the watercourse agreements, a fact which, again, could only reinforce the questioning of many States. The French delegation considered that it would be prudent to go further with a change to a convention only if it appeared clear that there were reasonable chances of success. It must therefore be asked whether the conditions for general acceptance of the draft currently existed. If that were not the case it might be advantageous to restrict the scope of the draft by making substantial amendments to certain articles (in particular articles 3 and 5). It was only after such redrafting had been completed that the question of convening a conference of plenipotentiaries could properly be decided. If, on the other hand, the Sixth Committee were to express its preference for drawing up model rules on the basis of the draft articles prepared by the Commission, the draft might be adopted more or less unchanged and would thus constitute a document of universal reference.

24. Mr. THEUAMBOUNMY (Lao People's Democratic Republic) said that the text of the Commission's draft articles on the law of the non-navigational uses of international watercourses was generally acceptable to his delegation. As far as the form of the draft articles was concerned, his delegation considered that, given the wide diversity of watercourse systems, it would be difficult to prepare a single international convention of universal application and associated itself with the many other delegations that had expressed their preference for a framework agreement.

25. Articles 5 and 7 of the draft together formed the cornerstone of the future instrument. Article 5 set forth the rule of equitable and reasonable utilization, one purpose of which was to avoid any conflict on utilization between the watercourse States. Article 7 provided that the watercourse States should exercise due diligence so as not to cause harm to other watercourse States. It was clear to his delegation that, in practice, when a State envisaged utilization which seemed likely to cause significant and lasting harm of the interests of another watercourse State, such utilization should be deferred until agreement had been reached between them.

26. Article 12, which dealt with notification concerning planned measures which might have adverse effects, was equally important. The principle of prior notification was generally recognized in a number of declarations or resolutions adopted by many intergovernmental conferences and meetings. His delegation

acknowledged the soundness of that article and fully approved its content. According to his delegation's interpretation, the article was intended to assist the watercourse States to ensure that new forms of utilization did not give rise to conflicts.

27. Mr. ELARABY (Egypt) recalled that many great civilizations had arisen and developed along watercourses. That was notably the case with Egypt, which had been described as the gift of the Nile. The international community had long been hesitant about drafting universal rules on the utilization of watercourses. The adoption in 1966 of the Helsinki Rules concerning the utilization of the waters of international drainage basins had taken the form of guidelines rather than of an international instrument. For the Egyptian delegation it was above all important to approach the subject in such a way as to ensure the required balance and constructive cooperation between countries in the non-navigational uses of international watercourses. It was clear that, if a State exercised its right in a manner that was prejudicial to other watercourse States, that would inevitably have adverse effects on the stability of the States and harm their neighbourly relations.

28. In order to achieve the necessary balance between the interests of the watercourse States, a certain number of principles should be reflected in the draft articles under consideration. In the first place, to make optimum use of the watercourses, cooperation between the States concerned should be strengthened through an exchange of information and joint management which might take the form of machinery for the supervision of joint projects for the exploitation of the water resources. In the second place, any discharge of waste which might have an adverse impact on the environment, particularly the marine environment, must be prevented. In that connection, the liability of States for ecological damage likely to affect watercourses, whether in time of war or peace, must be codified. That also meant that watercourse States which planned to undertake projects likely to have an impact on any other watercourse State were obliged to engage in prior consultations. In the third place, whatever the form in which the articles were adopted, it was inconceivable that they could contain provisions contrary to international law in force: bilateral conventions, customary law and principles already established by international committees, judgements or arbitral awards. Any departure from that principle would be likely to erode confidence in the system of international law that had governed watercourses for many years.

29. Fourthly, his delegation considered that in article 7, the requisite balance between the interests of the State causing the harm and those of the State suffering the harm had not been achieved. The article should have expressly set forth the need for all States to refrain from any activity harmful to another State. As currently drafted, it did not oblige the State whose use caused the harm and which was to consult with the State suffering the harm to refrain from that use. It should thus be amended so as to reconcile the interests of all watercourse States. The same was true of paragraph 3 of article 17: it was important that the State in question should delay implementation of the planned measures until the end of the consultations or until the dispute had been settled.

30. In his delegation's view, the draft articles should take the form of a framework agreement, once they had been considered in the General Assembly or by a conference of plenipotentiaries. As for the choice of the body in which the draft articles should be considered, it had no particular preference: the key point was that all States should have an opportunity to participate in that process.

31. Mr. MORSHED (Bangladesh) said that the Commission, in its efforts to contribute to the codification and progressive development of the law of the non-navigational uses of international watercourses and to elaborate universal rules governing the utilization of increasingly scarce water resources and to ensure their protection and conservation, had had to take into account and synthesize the traditional law on the matter, as crystallized in the Helsinki Rules, international environmental law, the volume of which continued to increase, and the 1982 United Nations Convention on the Law of the Sea. However, the balance between those elements that the Special Rapporteur had tried to introduce into the draft articles contained in document A/49/10 was sometimes precarious, threatening to undermine the solidity of the structure as a whole.

32. Article 5 set forth the fundamental rule of equitable utilization, expressing it as an obligation to utilize an international watercourse "in an equitable and reasonable manner" - a phrase which might give the impression that the rule was a procedural rather than a substantive one. The rule was nevertheless strengthened by the introduction of the concepts of "adequate protection" and "participation", although the latter concept was also qualified by the phrase "in an equitable and reasonable manner".

33. The factors relevant to equitable and reasonable utilization, as enumerated in article 6, were integral to the application of article 5 and determined the close relationship between articles 5 and 7. However, the expression "when the need arises" inserted in paragraph 2 of article 6 should be deleted, as it might render the application of the rule of equitable utilization nugatory.

34. In his delegation's view, the greatest difficulty related to article 7, which amended a substantive rule of customary law and abridged the rights of States, while at the same time adversely changing the relationship between articles 5 and 7. The concept of due diligence raised the threshold of harm, and served only to complicate matters further. It was stated in the commentary (p. 237) that due diligence was "an obligation of conduct, not an obligation of result"; and, a few lines later, that it was "an objective standard" - a statement that seemed more accurate. Another difficulty was posed by the question of compensation, referred to in paragraph 2 (b) of article 7. While the "polluter pays" principle was now universally recognized, the same could not be said in respect of other forms of harm; the explanation that pollution affected the quality of water, whereas other forms of harm led to changes in the quantity of water, was not adequate. The Special Rapporteur had himself recognized the functional link between the quality and quantity of water resources. The substitution of the word "significant" for the word

"appreciable" in the title of the article did not take account of scientific and technical advances in the measurement of pollution thresholds.

35. As article 8 was the cornerstone of the draft articles, it should specify the procedures to be applied where there was a breakdown of consultations, a situation which could jeopardize cooperation.

36. Article 32 seemed to focus too closely on the European context in referring to the interests of natural or juridical persons, whereas in the vast majority of water disputes, especially in the developing world, the parties were States, or different provinces of one State. The real interest of the article lay in the fact that it tried to establish uniform rules for settlement of domestic and international water disputes. Settlement of disputes was in fact a key element of the draft articles. For that reason his delegation would wish to see the phrase "if agreed upon by the States concerned" deleted from article 33 (b).

37. With some key changes, the draft articles could be used in the elaboration of a convention by an international conference of plenipotentiaries, which would be in a better position to make use of inputs from the scientific community, universities and experts than would the General Assembly.

38. Ms. BETANCOURT de CALCAÑO (Venezuela) said that, broadly speaking, the effectiveness of the new instrument that might be elaborated on the basis of the draft articles on the law of the non-navigational uses of international watercourses could be compromised by the insertion of obligations that were difficult to define and implementation of which was left too much to the discretion of States. It was not a framework convention in the strict sense, and the draft articles should thus be supplemented by bilateral agreements governing the utilization, exploitation and protection of watercourses.

39. The expressions "significant" and "equitable and reasonable utilization", which appeared in several of the draft articles, were not unambiguous and were likely to give rise to disputes because of the wide range of interpretations to which they were open, even though doctrine and case-law had enabled their to be defined more precisely. In practice, what was equitable for one State was not necessarily equitable for another State. Admittedly, article 6, which set forth the factors to be taken into account in determining whether a utilization was equitable and reasonable, constituted an important contribution, but the connection between those factors and the expression "equitable and reasonable" was not made sufficiently clear. As for article 7, it contained the expression "significant harm", thus introducing an essentially subjective element which, furthermore, was left to the discretion of each of the States concerned.

40. Article 7 also set forth an extremely important rule founded on respect for the principle of the sovereign equality of States, in obliging watercourse States to utilize the watercourse in such a way as not to cause significant harm to other watercourse States. For the reasons previously referred to, the use of the expression "all due diligence" was nevertheless to be regretted, for the obligation was in fact an obligation of result, a concrete obligation that was binding on States. The same criticism could be levelled at the expressions

"optimal utilization" and "adequate protection" in article 8. As cooperation played a key role in the establishment of a balance between the rights and duties of users of international watercourses, it was of the utmost importance to define it precisely and not merely to leave the matter to the discretion of States. Article 9, on regular exchange of data and information, contained a further expression ("its best efforts" - paragraph 2; "their best efforts" - paragraph 3) that weakened the obligation set forth.

41. Her delegation agreed with the content and formulation of article 20 and considered that the term "ecosystems" was the appropriate one in that context. In article 21, the obligation to "prevent, reduce and control pollution", which was of extreme importance, was clearly defined in paragraph 2.

42. Her delegation agreed with the means of dispute settlement listed in article 33. With particular regard to paragraph (c) of that article, the Commission had been right to insert the expression "by agreement", which ruled out unilateral recourse, for that would be incompatible with the nature of the draft articles.

43. Her delegation supported the draft resolution on confined transboundary groundwater adopted by the Commission. It also supported the Commission's recommendation to entrust the task of elaborating a convention based on the draft articles to an international conference of plenipotentiaries, or to the Sixth Committee acting in the capacity of a codification conference.

44. Mr. NGUYEN DUY CHIEN (Viet Nam) welcomed the completion of the work on the draft statute for an international criminal court. Some time would be required, however, for further examination of the draft statute before a diplomatic conference was convened.

45. Turning to the law of the non-navigational uses of international watercourses (A/49/10), his delegation considered that the draft articles were well-balanced. As a watercourse State, Viet Nam understood how important watercourses and their uses were to watercourse States as a whole and to the daily life of people who lived along such watercourses; for that reason his delegation supported the principle of "equitable utilization" laid down in article 5, providing for both the right to utilize the water and the duty not to limit other States in their right to do so. The concept of "equitable participation", embodied in paragraph 2, ensured the goal of optimal utilization, which was achieved when watercourse States cooperated in protecting and developing the watercourse. The right to utilize watercourses was inseparable from the duty not to cause harm to other watercourse States, and that duty should be covered by a clear provision in a future convention. His delegation therefore fully shared Brazil's opinion that there were shortcomings in the current version of article 7, and it felt that the text adopted on first reading should be retained. That would be the only appropriate way to ensure a balance between article 5 and article 7, and between the rights and obligations of watercourse States.

46. His delegation believed that the term "watercourse" in article 2 (b) did

not include confined groundwaters, because the latter had no physical relationship with surface water and thus did not constitute part of a unitary whole. It also felt that the phrase "flowing into a common terminus" should be retained.

47. With regard to the settlement of disputes, he believed that the procedures stipulated in article 33 could be justified by the specific nature of disputes relating to non-navigational uses of international watercourses.

48. Lastly, his delegation expressed its support for the elaboration of a convention on the basis of the draft articles, either by the General Assembly or by an international conference of plenipotentiaries.

49. Mr. MOMTAZ (Islamic Republic of Iran) said that the International Law Commission had overcome the two major difficulties inherent in any attempt at the codification and progressive development of the law of the non-navigational uses of international watercourses, namely, the diverse nature of the various watercourses and the conflicting interests of upstream and downstream States. The flexibility of the draft provisions and the fact that they formed a framework agreement were the best guarantees of its effectiveness and its acceptance by the community of States. The framework-agreement formula had the advantage of stating clearly the principles and rules of general behaviour that watercourse States were required to adapt to each particular case when concluding agreements on international watercourses which were not yet subject to any such agreement. In an area where confusion, and indeed disputes, were common, the draft articles would undoubtedly be extremely useful.

50. The draft laid down two practical rules on the non-navigational uses of international watercourses, considered as the expression of customary law: the right of watercourse States to utilize an international watercourse in an equitable manner and the duty not to cause significant harm to another watercourse State. The carefully prepared commentaries accompanying the relevant draft articles were full of examples drawn from case-law and various schools of thought, illustrating their significant role in the elaboration and development of the law, and bearing witness to the fact that the Commission had produced a fine piece of codification.

51. The rule of equitable utilization as a right was based on the concept of the limited sovereignty of States over their water resources and was aimed at defining the rights and obligations of international watercourse States. In accordance with that rule, the needs of all watercourse States should be taken into account. Water distribution should be so managed that all watercourse States could satisfy their needs for the irrigation of agricultural land. There should be no question of mathematically equal distribution among the States concerned in every case. For that reason his delegation regretted that the Commission had not paid greater attention to the ways and means of implementing draft article 5 and had made no mention of the various apportionment criteria for international watercourse flows, such as equal bases, whether quantitative or territorial, or of the control mechanisms for flow allocation, such as joint commissions with equal representation or hypsometric gauging stations, as laid

down in the various agreements that had been concluded. Such criteria and mechanisms would have appreciably helped arid States - where water was scarce and in great demand - to strike a reasonable balance between their various needs and to ensure that they could enjoy the advantages to which they had a right.

52. Draft article 6, defining equitable and reasonable utilization, was of major importance for his delegation. He praised the restricted, non-exhaustive terms in which it had been possible to define the natural, historical, social and economic factors to be taken into account to ensure the equitable utilization of watercourses. However, although the reference in draft article 6, paragraph 1 (b), to "social and economic needs" was sufficiently broad to cover the use of water for agricultural purposes, the fact remained that in some regions the need for irrigation was so imperative that it merited a specific reference. It was regrettable that the question had hardly been touched on in the commentary to the article. In some parts of the world, such as the Middle East, the main economic function of watercourses remained irrigation, to which numerous treaties gave absolute priority. It was a rule of customary origin but established by treaty law. Indeed, that was the concept behind draft article 10, paragraph 1, which implicitly referred to such situations. In his delegation's view there were grounds for considering that the use of watercourses for irrigation in dry and desolate regions, where water shortage was an obstacle to agricultural development, was necessary for the requirements of "vital human needs", which draft article 10, paragraph 2, stated should be given "special regard".

53. The obligation not to cause significant harm, dealt with in article 7, was a specific application of the principle that territory should not be used in a way that caused harm. In that connection, the concept of "appreciable harm" used in the previous version of draft article 7 seemed more appropriate. The use of the adjective "significant" in the new version lowered the threshold of permissible harm and might give an advantage to upstream States. It was often difficult to define what was meant by "significant harm" and the existing circumstances must be taken into account in every case. While it was generally agreed that States had to tolerate insignificant harm or minor inconveniences arising from the use of watercourses by other States, that did not mean that the harm must necessarily be substantial in order to be taken into consideration. It was unfortunate that the Commission had not made any reference in the commentary to article 7 to certain examples in which the abusive use of a watercourse had undoubtedly resulted in significant harm, such as the case of diverting the water from the basin of another State. In fact, diversions raised the general question of the exhaustive or almost exhaustive use of watercourse flows. They could also change the point at which a watercourse crossed a frontier or lead to an increase in water salinity, thus destroying the ecological balance of a watercourse. The Commission's previous Special Rapporteur for the topic, Mr. McCaffrey, had emphasized in his fifth report the need to ensure a minimal flow in a watercourse so that the various uses made of it could be protected.

54. There was no longer any question that the requirements of neighbourliness restricted the freedom of action a State normally possessed in managing its

territory. It was necessary to reconcile the traditional view of the use of international watercourses, in which the independence of the sovereignty of the State prevailed, with the recent evolution of the rights and obligations by which States were bound in the exercise of their authority. While every State was entitled to construct works on the watercourses which ran through its territory, it was still incumbent on the upstream State to avoid any significant harm to the downstream State which might arise from such works.

55. With regard to procedures for ensuring the equitable utilization of watercourses, his delegation welcomed the fact that part III of the draft dealt entirely with procedural regulations intended to complement the rule of equitable utilization and to guide States in planning watercourse activities. Draft articles 12 to 19, dealing with the obligation of States to notify other watercourse States of planned measures which might have significant adverse effects on them, were on the whole acceptable and would promote cooperation between watercourse States. The issue was particularly topical when in an arid region an upstream State planned to build a hydroelectric power station which would seriously affect the viability of agricultural activities. Those two activities were in fact not entirely compatible: the periods during which water was contained by the dam often coincided with the periods during which a maximum amount of water was needed for irrigation. His delegation was convinced that priority should be accorded to already existing activities in areas where water resources were inadequate and that the upstream State which intended to execute such projects should guarantee a minimum flow to the downstream State. That was, moreover, the approach adopted in treaty law. In such cases, the States concerned would have to negotiate in good faith with a view to concluding an agreement on use of the watercourse. International practice supported the idea that States were obliged to negotiate with a view to reconciling differing interests. The reference made in article 19 to articles 5 and 7 should be understood in that light. If the negotiations were unsuccessful, urgent planned measures must be implemented with due regard to the interests of the other States, without, however, giving them the right to veto the execution of those measures.

56. Part III of the draft covered measures planned by upstream States which could have negative effects on downstream States; those provisions were thus intended to protect the right of downstream States to use of a watercourse. However, in some cases, it was the downstream State which could initiate certain measures to be taken by the upstream State in order to ensure the equitable use of the portion of the watercourse in its territory. In regions such as the Middle East, where, because of seasonal changes, watercourse flows were subject to sudden and extreme variations, it was often necessary to carry out construction work in the territory of the upstream State to regulate and control the volume of water. Numerous provisions in bilateral treaties established a framework for cooperation between riparian States in the construction and exploitation of works designed to guarantee the water supply and to avoid, as appropriate, any harmful effects of the waters. Draft article 25 dealt with the important question of the regulation of watercourses. Paragraph 1 of article 25 specified that watercourse States should cooperate, without stating that an obligation in that domain was incumbent on the upstream State. Current State

practice confirmed the idea that the upstream State was responsible for cooperating with the downstream State. That obligation was justified in so far as failure to respect it might result in harm such as catastrophic flooding of part of the territory of the downstream State, which would undeniably be in violation of the obligation of States under draft article 5 not to cause significant harm. It was in that light that his delegation interpreted draft article 27 on prevention and mitigation of harmful conditions.

57. He wished to make it clear that his comments had arisen from a desire to improve the text and did not in any way call in question the quality of the work accomplished by the Commission and the Special Rapporteur. In fact he shared the view expressed by the Special Rapporteur when introducing his first report on the topic, to the effect that the draft would go a long way towards solving certain problems in the area of watercourses which the world would have to face during the coming decades. According to the regulations adopted in September 1989 by the World Bank, the granting of project financing for hydroelectric installations involving international watercourses was now subject to terms which generally reflected the rules concerning cooperation between watercourse States, such as those formulated by the Commission, requiring in particular a detailed study of the project and its dissemination among all the watercourse States. It was to be hoped that the General Assembly would in the near future adopt a convention on the law of the non-navigational uses of international watercourses, on the basis of the draft elaborated by the Commission.

58. Mr. HALLAK (Syrian Arab Republic) said that he welcomed the adoption on second reading by the Commission of the draft articles on the law of the non-navigational uses of international watercourses. That was a matter of particular importance since water often gave rise to disputes between States. While there were many treaties dealing with watercourses, certain among them had yet to be regulated. It was therefore important to know which regimes and regulations were applicable in the absence of a treaty. The provisions adopted by the Commission thus filled an important gap and his own country was particularly interested in the matter because it shared watercourses with other States. It had followed the work of the Commission with interest and was in favour of adopting a framework convention in that field as rapidly as possible. The procedural provisions of the draft could only be operational in a binding treaty.

59. He welcomed the balance the draft had achieved between the various interests of riparian States and the principles of sovereignty and independence of States. The rule that States should endeavour, in the optimal use of a watercourse, to reduce to a minimum any harm to other States was completely justified. It was also appropriate that, under article 6, social and economic needs of watercourse States were among the factors that had to be taken into account in determining equitable and reasonable utilization. His delegation also endorsed the definition in draft article 2 of the term "watercourse", in particular the words "normally flowing into a common terminus", even though they made the provision somewhat cumbersome.

60. His delegation hoped that the draft prepared by the Commission would be adopted in the form of a convention as rapidly as possible.

The meeting rose at 6.10 p.m.